

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NORTH COAST ELECTRIC COMPANY, a
Washington corporation,

Respondent,

v.

ARIZONA ELECTRIC SERVICE, INC., a
Washington corporation; LYDIA A.
HOEFER; F. STEVEN HOEFER; and
NORTHSTAR BANK, N.A., a national
bank,

Defendants,

SEATTLE CONSTRUCTION SERVICES,
INC., a Washington corporation; SEA
CON, LLC, a Washington limited liability
company; and NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA, a foreign corporation,

Appellants.

No. 62969-7-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: August 23, 2010

Appelwick, J. — Sea Con and National Union appeal the trial court's
judgment against them, arguing that North Coast was not entitled to reformation

of a lien release agreement on the alternative bases of unilateral and mutual mistake. The appellants also argue the trial court erred in dismissing its defenses as a matter of law, finding that Sea Con was liable as principal for North Coast's foreclosure against the bond, determining damages, and awarding fees. Because reformation was a proper remedy and because the trial court properly determined the remaining issues, we affirm.

FACTS

This is the second appeal in this case, which stems from a relatively straightforward materialman's lien dispute. North Coast Electric Company supplied electrical materials to Arizona Electric Service, Inc. (AES), a subcontractor of Sea Con, LLC, for a commercial construction project in Bothell. N. Coast Elec. Co. v. Ariz. Elec. Serv., Inc., noted at 132 Wn. App. 1006, 2006 WL 689194, at *1. AES fell behind on its payments. Id. On July 25, 2002, Sea Con called North Coast to negotiate a lien release. Id.

In a confirmation letter that North Coast faxed on July 25 from its Seattle office to Sea Con was a list of invoices—dating from April 26 through May 24, 2002—that made up the balance agreed upon for the lien release. Id. The next day, Sea Con prepared a lien release waiving North Coast's right to file a lien through June 30, 2002, rather than May 24, 2002. Id. Sea Con delivered the release along with a check to North Coast's Bellevue office, where Paul Telkamp signed the release and accepted the check. Id. Another North Coast employee in Seattle realized the lien release listed the end of the release period as June 30, not May 24. Id. North Coast notified Sea Con about the seemingly

erroneous date, but Sea Con refused to change the date to May 24. Id. at 2. North Coast recorded a lien against the property on September 4, 2002. In March 2003, Sea Con posted a lien release bond, with North Coast as the grantee and itself as principal. National Union Fire Insurance Company of Pittsburgh, PA, was the surety on Sea Con's bond.

By the time Sea Con had posted the lien release bond, North Coast had sued Sea Con and AES, seeking (1) foreclosure of a materialman's lien pursuant to RCW 60.04 in the amount of \$201,154.16 and (2) reformation of the lien release agreement with Sea Con based on mutual and unilateral mistake. Id. The trial court granted Sea Con's motion for partial summary judgment on the lien release claim. Id. Sea Con acknowledged the validity of the remaining portion of North Coast's lien claim (i.e., foreclosure of the lien for materials invoiced by North Coast to AES after the contested period of release). Id. The court entered judgment on December 7, 2004. Included in the 2004 judgment is North Coast's entitlement to foreclose on its materialman's lien for materials delivered to AES on or after July 1, 2002—the disputed date on which the lien release ended.

In the first appeal, we addressed whether the trial court had properly dismissed North Coast's release of lien agreement reformation claim on summary judgment. Id. We reversed, holding North Coast had presented sufficient evidence of both unilateral and mutual mistake to survive summary judgment under either theory. Id. at *4, *6–7. We remanded for trial on the lien release reformation claim. Id. at *7. Sea Con did not appeal the trial court's

judgment against it on the lien foreclosure claim for amounts due July 1 and beyond.

After a bench trial, the court entered judgment against Sea Con and National Union, the surety on Sea Con's bond. The trial court found North Coast was entitled to reformation of the lien release agreement on the alternative bases of unilateral and mutual mistake. The trial court awarded fees to North Coast under RCW 60.040.181(3), as well as pre- and postjudgment interest and costs. Sea Con and National Union (hereinafter referred to collectively as "Sea Con" unless stated otherwise) now appeal.

I. Contract Reformation

Reformation is an equitable remedy which permits the court to correct errors to render an instrument expressive of the real intentions of the parties. J.J. Welcome & Sons Constr. Co. v. State, 6 Wn. App. 985, 988, 497 P.2d 953 (1972). The trial court concluded North Coast was entitled to reformation of the lien release to cover only the purchases for which North Coast received payment—those through May 24, 2002, and not through the erroneous release date of June 30, 2002. The court relied on either or both of the doctrines of mutual mistake or unilateral mistake. Sea Con contends the trial court erred in concluding that reformation was the proper remedy. Sea Con also argues the court erred in finding that North Coast was entitled to reformation for "either or both" of the mistake doctrines, as finding both types of mistake is "internally inconsistent."

Conclusions of law entered after a bench trial are reviewed de novo.

Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 79 P.3d 369 (2003). Findings of fact are reviewed to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006), aff'd, 162 Wn.2d 340, 172 P.3d 688 (2007). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Dickie, 149 Wn.2d at 879. Unchallenged findings of fact are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Our review of the trial court's decision to reform the lien release agreement is limited by Sea Con's failure to assign error to, or provide argument about, the trial court's findings of fact. Sea Con only assigns error to two findings of fact (Finding of Fact (FF) 2 and FF 16), neither of which pertain to the facts underlying the dispute about the dates of the lien release agreement.

A party is entitled to reformation of a contract for mutual mistake if the party seeking reformation proves by clear and convincing evidence the following elements: (1) both parties to the instrument had an identical intention as to the terms to be embodied in a proposed written document, (2) that the writing which was executed is materially at variance with that identical intention, and (3) innocent third parties will not be unfairly affected by reformation of the writing to express that identical intention. Leonard v. Wash. Employers, Inc., 77 Wn.2d 271, 279, 461 P.2d 538 (1969).

The unchallenged findings of fact show that Brian Yandell, Sea Con's project manager, learned AES was behind on its payments to North Coast.

Yandell called Gary Hoy, North Coast's credit manager, in late July. Hoy told Yandell that a payment of \$101,417.31 would bring AES's account current. At that time, AES's account was overdue for purchases through May 24, 2002. There was conflicting testimony about whether Hoy and Yandell actually discussed the May 24 date in their conversation. The phone conversation constituted an agreement that North Coast would release its right to file a lien for the overdue purchases when Sea Con paid North Coast \$101,417.31. Hoy told Yandell that his assistant in the North Coast Seattle office would be prepared to handle the exchange of the check for an appropriate release. Hoy then told his assistant to expect the check to pay for AES's purchases through May 24 and to carefully review the release to ensure it contained the proper date.

Hoy faxed to Yandell a list of all the invoices to be covered in the release—invoices through May 24. Yandell prepared a lien release agreement and, instead of the May 24 date, inserted an effective date of June 30, 2002, because he did not recall discussing a specific date with Hoy. Yandell presented the check and lien release agreement to Paul Telkamp, an employee in North Coast's Bellevue location, not to Hoy's assistant, Julie Aipperspach, in the Seattle office. Yandell did not tell Telkamp that Hoy had instructed him to present the release to Hoy's assistant in the Seattle office. Telkamp accepted the check. When Telkamp faxed the lien release agreement to Aipperspach in Seattle, she called Yandell to explain that the date of release was incorrect. Yandell refused to correct the date. Hoy attempted to contact Yandell the next day, but Sea Con did not respond. These unchallenged findings of fact amply

support the court's decision to reform the lien release agreement under the theory of mutual mistake.

The court noted there was a conflict in the parties' testimony about whether Hoy and Yandell agreed to the May 24 date in the original phone conversation. The court resolved the conflicting testimony in favor of North Coast, finding that "[b]oth parties agreed that North Coast would provide a release only for, and to the extent of, the purchases being paid for with the \$101,417.31 check. Mr. Yandell incorrectly inserted an effective date of June 30, 2002 (rather than May 24, 2002) in the release he prepared."¹ This agreement served as the requisite mutual intent for a finding of mutual mistake, as the release Yandell prepared and Telkamp signed varied from the original agreement.

The trial court also analyzed the case under North Coast's alternative theory of unilateral mistake. A party is entitled to reformation of a contract for unilateral mistake when it proves by clear and convincing evidence that there is a valid antecedent agreement and he or she has been induced by the other contracting party's inequitable conduct to mistakenly enter into a written agreement that does not reflect the antecedent agreement. Gammel v. Diethelm, 59 Wn.2d 504, 507–09, 368 P.2d 718 (1962). North Coast had to show that (1) it mistakenly believed that the lien release it sought to reform accurately reflected an earlier agreement; (2) that Sea Con knew the written

¹ Although this statement is labeled a conclusion of law, we construe it as a finding of fact. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

agreement did not reflect the earlier agreement; and (3) that Sea Con through inequitable conduct induced North Coast to sign the lien release. Id.

The unchallenged findings amply support the alternative theory of unilateral mistake. Hoy had specifically confirmed the details of the release by fax with an agreed upon amount of \$101,417.31 and provided invoices for that amount covering AES's purchases through May 24. But, Yandell drafted the release to cover all advances through June 30. Hoy had specifically instructed Yandell to give the release agreement to Hoy's assistant in the Seattle office, who was prepared to carefully review it. But, Yandell presented the lien release for signature at a different office than Hoy had instructed and to a North Coast employee who had no knowledge of the specifics of the telephonic agreement. Yandell did not bring to Telkamp's attention the effective date of the lien release before obtaining Telkamp's signature. Finally, the trial court entered a specific finding that Yandell's conduct was inequitable.

Whether we view Sea Con's conduct as a mistake or as knowing alteration, the facts support reformation. The trial court's conclusion of law that North Coast was entitled to reformation of the lien release agreement is supported by the findings of fact.²

² Sea Con seems to argue, somewhat confusingly, that the lien release was nevertheless valid for other of North Coast's claims for payment, despite the disagreement over the effective release date. Sea Con's issue statement pertains to assignment of error 6, which states the trial court erred in conclusion of law 26 when it "refused to enforce the lien release that North Coast executed on items supplied to AES." Conclusion of law 26 states that Telkamp's failure to notice the erroneous release date when Yandell presented it was excused by Yandell's misrepresentations and by the fact that the release did not release any of North Coast's claims for payment. Indeed, the lien release agreement only

II. Defenses to Reformation

Sea Con also contends the trial court erred in determining that its negligence and waiver defenses to North Coast's contract reformation claim did not apply.

Sea Con argued to the trial court that Telkamp, the North Coast employee who accepted the lien release, was negligent in signing the release without comparing it to the accounting records. In the first appeal, this court explained that negligence is not a defense to a claim for contract reformation based on unilateral mistake. N. Coast Elec., 2006 WL 689194, at *6 n.15; see also Wash. Mut. Sav. Bank v. Hedreen, 125 Wn.2d 521, 529, 886 P.2d 1121 (1994). The court did not err in concluding Sea Con's defense based on North Coast's alleged negligence was inapplicable.

Sea Con also argued to the trial court that Telkamp's deposit of Sea

released North Coast's right to file a lien, and did not release any claim for payment:

North Coast Electric Company waive [sic] and releases any mechanics or materialman's lien, equitable lien, stop notice, bond or retainage claim right the undersigned has on the project . . . for labor, services, equipment through the date of June Thirtieth, 2002. In consideration for payment of the sum of \$101,417.31, the receipt and sufficiency of which is hereby acknowledged. . . .

Nothing herein shall be construed to waive or release any such rights which may accrue to the benefit of the undersigned for labor, services, equipment or material furnished to the above project subsequent to said date

The court's conclusion accords with the language of the lien release agreement. After the court determined North Coast was entitled to reform the lien release agreement to be effective only through May 24, the agreement had no effect after that date. We find no error.

Con's check constituted waiver of the right to seek reformation. The trial court concluded the waiver argument was inappropriate, because there was no evidence that North Coast knowingly and intentionally waived a known right through Telkamp's deposit of the check. Waiver requires intentional relinquishment. Wagner v. Wagner, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). Unless by express agreement, a waiver must be demonstrated through unequivocal acts or conduct evincing an intent to waive. Id.

The unchallenged findings demonstrate that North Coast did not intend to waive its right to argue reformation. Sea Con argued that North Coast's acceptance of the check signaled its acceptance of all the terms of the lien release. But, it is undisputed that Telkamp did not know of the discrepancy. He could not knowingly waive North Coast's right to argue reformation. Aipperspach contacted Yandell as soon as she discovered the erroneous release date, explaining that the release date was incorrect. Hoy contacted Yandell soon thereafter, explaining that the date in the lien release agreement was incorrect. These two acts by Hoy and his assistant sufficiently indicate that North Coast did not intend to waive its right to reform the contract. The trial court did not err in dismissing Sea Con's defenses based on waiver and negligence.

III. Defect in the Notice of Lien

In the first proceeding in this case, the trial court awarded North Coast a final judgment foreclosing its lien for purchases made on or after July 1. N. Coast Elec., 2006 WL 689194, at *2. Neither of the defendants, Sea Con or

National Union, cross-appealed the judgment allowing North Coast to foreclose on its lien, when North Coast appealed the order of summary judgment against it on the lien release reformation claim. On remand, Sea Con attempted to argue North Coast had not complied with the notice requirements of RCW 60.04.031. However, the trial court concluded, “North Coasts’ right to assert a lien was established in the earlier proceedings and cannot now be challenged.” Sea Con now argues North Coast failed to comply with the notice of lien requirements of RCW 60.04.031, because North Coast notified the lessor but did not notify the record owner of the real property.³

While RAP 2.5(c)(1) provides this court with the authority to “review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case,” we decline to address Sea Con’s notice argument here. The argument appears to be nothing more than a collateral attack on the trial court’s 2004 judgment, which was final and appealable under RAP 2.2(a)(1) as a final judgment. In that final judgment, the trial court awarded North Coast recovery on the same lien for materials invoiced by North Coast to AES after the contested period of release.

³ Because notice was allegedly improper, Sea Con argues the court lacked subject matter jurisdiction to enforce the claim of lien. Sea Con’s subject matter jurisdiction argument is meritless. Had Sea Con successfully raised the notice issue in the first instance, the trial court might have ruled on summary judgment that North Coast was not entitled to recover on its lien. This has nothing to do with subject matter jurisdiction.

North Coast’s response to the notice argument based on collateral estoppel and/or res judicata is similarly meritless. Both of these doctrines require the issue to have been litigated. Here, Sea Con never raised the issue in the first trial court action nor in its subsequent appeal.

Sea Con could have argued that North Coast's notice of lien was insufficient in the trial court; it did not. Nor did it appeal the entry of the 2004 judgment for amounts accruing July 1 and after, based on that same lien claim and notice. Sea Con has waived any opportunity to attack the validity of the notice of lien. See, e.g., Baldwin v. City of Seattle, 55 Wn. App. 241, 252, 776 P.2d 1377 (1989) (holding that a party was precluded from appealing two evidentiary rulings in a negligence action, because the party had not appealed the final judgment entered on that claim). Indeed, this court's first opinion explicitly states Sea Con acknowledged the validity of the remaining portion of North Coast's lien claim (i.e., foreclosure on the lien for materials delivered outside the disputed timeframe of the lien release agreement). N. Coast Elec., 2006 WL 689194, at *2.

The trial court did not err in concluding Sea Con waived its right to challenge the validity of the notice of lien.

IV. Defects in the Corporate Attestation

In its supplemental brief, Sea Con argues North Coast did not comply with the corporate acknowledgment requirements as laid out in RCW 60.04.091(2). This statute requires that a notice of claim of lien, "Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW." RCW 60.04.091(2). RCW 64.08.070 provides that the corporate acknowledgment may either be in the form

described therein or in the form provided by RCW 42.44.100(2). Sea Con takes issue with the fact that Bill Oster, who signed the notice, used the personal rather than corporate language required in RCW 60.04.091(2).

Sea Con relies on Williams v. Athletic Field, Inc., 155 Wn. App. 434, 443–45, 228 P.3d 1297 (2010), where Division Two court held a lien was invalid for failure to comply with the statutory attestation requirements for corporate acknowledgment. There, however, the issue of the validity of the lien based on the attestation clause was one of the issues at trial.⁴ See id. at 437–38.

Notwithstanding the holding in Williams, Sea Con’s corporate attestation argument amounts to nothing more than a collateral attack on the 2004 judgment in which North Coast prevailed on its lien foreclosure claim. As with Sea Con’s argument about the validity of the notice of lien, it has waived its right to present the corporate attestation argument here. The trial court’s 2004 judgment, which

⁴ We also question the result in Williams. Division Two relied on a case where the Court of Appeals had invalidated a lease, because the lessor acknowledged a lease using the individual rather than corporate acknowledgment form. Williams, 155 Wn. App. at 444 (citing Ben Holt Indus., Inc. v. Milne, 36 Wn. App. 468, 472–73, 675 P.2d 1256 (1984)). The court in Ben Holt determined that both the acknowledgement and the underlying instrument were invalid. 36 Wn. App. at 472–73. In the lien context, however, there is a strong statutory directive that “RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 . . . be liberally construed to provide security for all parties intended to be protected by their provisions.” RCW 60.04.900. This directive clearly applies to RCW 60.04.091. See, e.g., Northlake Concrete Prods., Inc. v. Wylie, 34 Wn. App. 810, 818, 663 P.2d 1380 (1983) (explaining the Legislature’s intent that “the lien laws shall be liberally construed with the view to effecting their object” meant that “when it has been determined that persons come within the operation of the act it will be liberally applied to them.” (quoting De Gooyer v. Nw. Trust & State Bank, 130 Wash. 652, 653, 228 P. 835 (1924), aff’d, 132 Wash. 699, 232 P. 695 (1925))). The Williams decision does not take this directive into account. Neither the signor’s identity nor his authority is at issue here, only technical compliance.

was final and appealable under RAP 2.2(a)(1) as a final judgment, awarded North Coast recovery on the same lien for materials invoiced by North Coast to AES after the contested period of release. The corporate attestation issue is not timely raised.

V. Sea Con's Liability as Judgment Debtor

Sea Con next argues the trial court erred in awarding judgment against Sea Con individually instead of only against the bond. The trial court's finding reads:

North Coast is entitled to an additional judgment against Defendants, up to the full amount of the lien release bond, as follows:

a. In the principal amount of \$172,638.66.

Exhibit 66, the release of lien bond, shows that Sea Con bound itself as principal, or the primary obligor, on the bond, with National Union as the surety:

That we, SEA CON LLC, as Principal and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, as Surety, are held and firmly bound unto NORTH COAST ELECTRIC CO., in the penal sum of THREE HUNDRED SIXTEEN THOUSAND TWO HUNDRED ELEVEN & 12/100 (\$316,211.12) . . . to the payment of which, well and truly to be paid, we bind ourselves . . . jointly and severally, firmly by these presents.

The bond is a contract construed according to the standard rules of contract interpretation. Colo. Structures, Inc. v. Ins. Co. of the W., 125 Wn. App. 907, 915, 106 P.3d 815 (2005), aff'd, 161 Wn.2d 577, 167 P.3d 1125 (2007). The plain language of the bond agreement reflects Sea Con's agreement that it would be jointly and severally liable for recovery up to the bond amount.

Sea Con also argues that it cannot be liable beyond the bond amount,

based on the language of RCW 60.04.161. RCW 60.04.161 reads, in pertinent part:

The effect of recording a bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed. . . . If an action is timely commenced, then on payment of any judgment entered in the action or on payment of the full amount of the bond to the holder of the judgment, whichever is less, the surety shall be discharged from liability under the bond.

RCW 60.04.161 clearly limits the liability of the surety to the bond amount, assuming a valid lien. But, the statute contains no language that expressly limits the liability of any party other than the surety. Nor does RCW 60.04.161 preclude judgment on the lien for amounts in excess of the bond. Rather, Sea Con has statutory liability due to its privity with the owner of the property and the subcontractors. RCW 60.04.151.

The posting of the bond releases the property from both the lien and any action brought to recover the claimed amount. RCW 60.04.161; DBM Consulting Eng'rs, Inc. v. U.S. Fid. & Guar. Co., 142 Wn. App. 35, 41, 170 P.3d 592 (2007), review denied, 164 Wn.2d 1005, 190 P.3d 54 (2008). However, posting a bond does not preclude a deficiency judgment against the general contractor or land owner. Id. Nor does it preclude such deficiency judgment from becoming a judgment lien on the underlying property. Nothing extinguishes or caps the contractor's statutory liability other than full payment of the amount determined due on the lien.

Finally, Sea Con cites RCW 60.04.181(2) in support of its argument that the court should not have entered judgment against it. RCW 60.04.181 provides

a lien hierarchy where there are multiple construction liens claimed against the same property. It then provides that “[a] personal judgment may be rendered against any party personally liable for any debt for which the lien is claimed.” RCW 60.04.181(2). Nothing in this section limits or extinguishes Sea Con’s liability. It does the opposite, by providing that deficiency judgments may be entered against persons liable on the lien claim when the foreclosed property was insufficient to satisfy the debt. Id. However, the priority of the materialman’s lien is lost when the bond is posted. The statute makes no provision for that priority to revive as to any subsequent deficiency judgment.

The trial court did not err in entering judgment against both Sea Con and National Union.

VI. Judgment Amount

The trial court entered judgment against Sea Con and National Union in the amount of \$172,638.66 for materials delivered after the May 24 lien release agreement. Sea Con argues North Coast did not present evidence to support the entry of the \$172,638.66 judgment in North Coast’s favor. Sea Con contends it was impossible to determine the delivery date for many of the materials, preventing an accurate calculation of the judgment.

North Coast, as the lien claimant, bore the burden of proving what materials and equipment it provided to the project after May 24, as well as the value of those materials and equipment. See Standard Lumber Co. v. Fields, 29 Wn.2d 327, 344, 187 P.2d 283 (1947). Sea Con does not point to any authority for the proposition that the delivery date is a necessary piece of information in

determining the amount of recovery on a lien, but it of course has a right to avoid double liability. The evidence North Coast supplied was a copy of each and every invoice, each with an invoice date, as well as a comprehensive accounting of the outstanding amount for materials shipped and invoiced between May 25 and June 30 (the period North Coast disputed was covered by the lien release agreement).⁵ The final accounting showed an outstanding balance of \$172,638.66. Substantial evidence supports the trial court's entry of judgment in favor of North Coast for materials provided between May 25 and through June 30.

VII. Trial Fees

The trial court awarded costs, disbursements, and reasonable attorney fees to North Coast. However, it limited recovery such that "the total principal amount, plus the award of costs, pre-judgment interest, disbursements, post-judgment interest and attorney's fees in both judgments entered or to be entered in favor of North Coast . . . shall not exceed the full \$316,211.12 . . . amount of the lien release bond adjusted downward for all payments made under the earlier judgment."⁶

⁵ Again, the trial court had already entered judgment in 2004 allowing North Coast to foreclose on its lien for materials provided after July 1.

⁶ The court also awarded attorney fees to North Coast in October 2008 for expenses incurred in responding to Sea Con's motion to quash its writ of garnishment. North Coast argues this award means the bond cannot limit an award of attorney fees. The fees for the writ of garnishment were a separate proceeding under RCW 6.27, and the award of fees was likely based on RCW 6.27.230 ("Where the answer [to the writ of garnishment] is controverted, the costs of the proceeding, including a reasonable compensation for attorney's fees, shall be awarded to the prevailing party.").

North Coast contends this was incorrect, because neither RCW 60.04.161 nor the language of the bond limits Sea Con's liability, but the trial court chose to do so anyhow. As noted in footnote 5 above, we agree with North Coast's proposition. However, North Coast did not cross-appeal this conclusion of law, so we decline to address it.⁷

VIII. Fees on Appeal

Both parties agree that the prevailing party in this action receives attorney fees under RCW 60.04.181(3). That statute provides:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable.

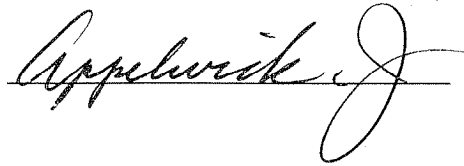
RCW 60.04.181(3).

RCW 60.04.181 concerns the lien hierarchy where there are multiple construction liens claimed against the same property. However, this court has applied it in a situation where there were not competing liens, stating that it "permits the court to award reasonable attorney fees and costs to the prevailing party in an action to enforce a lien." DBM Consulting Eng'rs, 142 Wn. App. at 37, 42 (awarding fees under RCW 60.04.181 to the surety in an action by DBM

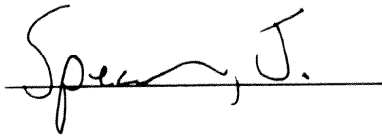
⁷ Sea Con argues that North Coast did not comply with RCW 60.04.091(2), which requires a lien claimant to give a copy of the claim to the owner within fourteen days of filing the claim. If the lien claimant does not comply with this requirement, he forfeits "any right the claimant may have to attorneys' fees and costs *against the owner* under RCW 60.04.181." RCW 60.04.091(2) (emphasis added). The trial court did not award fees against the owner. RCW 60.04.091(2) is inapplicable to this case.

against the surety to recover on the lien bond after DBM had prevailed against the owner of the underlying property for a breach of contract claim). This action arose over a dispute between Sea Con and North Coast about the scope of the lien release agreement. The judgment entered for the period not covered by the lien release was an action to enforce the lien North Coast had filed. Therefore, we award fees on appeal to North Coast under RCW 60.04.181.⁸

We affirm.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Sperry J.", written over a horizontal line.

⁸ Sea Con again relies on RCW 60.04.161 to support its argument that its liability for costs, fees, and interest is limited by the bond amount. For the reasons we discussed above, we see no basis to read this limitation into the statute.

Grossey J